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In The

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

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No. ———

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DISTRICT COUNCIL 51, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES AND STANLEY HARMON,

Petitioners,

vs.

MITCHELL B. GOLDBERG and CITY OF CINCINNATI, ET AL.

Respondents.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

---

District Council 51, American Federation of State, County and Municipal Employees and Stanley Harmon, an employee of the City of Cincinnati for himself and other employees similarly situated, petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Ohio entered in this case on October 21, 1970, dismissing their appeal from the denial of their motion to intervene as parties defendant.

## OPINIONS BELOW

The opinions of the courts (sic)[1] relating to the issue of intervention are appended hereto as follows: Petitioners' motion to intervene in the Court of Common Pleas was denied without opinion, the order thereon, dated February 16, 1970 being set out in the Appendix at p. 15. The opinion of the Court of Appeals, First District of Ohio, dated May 11, 1970 (not reported), affirming said order of the Court of Common Pleas is set out in the Appendix at p. 16. The opinion of the Court of Appeals, dated May 7, 1970 (not reported), denying Petitioners' motion to intervene in that court is set out in the Appendix at p. 17. The order of the Supreme Court of Ohio, dated October 21, 1970 (Ohio Law Reporter, October 26, 1970, p. 17), dismissing Petitioners' appeal, is set out in the Appendix at p. 18.

Also appended hereto are the judgment of the Court of Common Pleas, dated February 17, 1970 (not reported), dismissing plaintiff's petition (Appendix, at p. 19); the Opinion of the Court of Appeals, First Appellate District of Ohio, dated June 22, 1970 (23 Ohio App. (2d) 97), reversing the judgment of dismissal and awarding judgment in favor of the plaintiff (Appendix at pp. 20-25). The Supreme Court of Ohio has taken jurisdiction of the appeal by the defendants from the judgment of the Court of Appeals (Ohio Law Reporter, October 26, 1970, p. 17), and said appeal is now pending.

## JURISDICTION

The judgment of the Supreme Court of the State of Ohio dismissing Petitioners' appeal (Appendix, infra, p.

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[1] In the courts below the case is entitled *Goldberg v. City of Cincinnati, et al.*

18) was entered on October 21, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

## QUESTIONS PRESENTED

1. Whether, in an action by a taxpayer to enjoin the City of Cincinnati from executing and performing an agreement with a labor organization, the recognized bargaining agent of certain employees of the city, the denial of intervention by said labor organization constitutes a denial of due process and equal protection of the laws under the Fifth and Fourteenth Amendments of the Constitution of the United States.

2. Whether, in an action by a taxpayer to enjoin the City of Cincinnati from granting wage increases to employees of the city because they allegedly engaged in a strike in violation of a state statute which bars strikes by public employees and imposes sanctions upon employees who are found to have struck in violation of its provisions, the denial of intervention by such employees as a class constitutes a denial of due process and equal protection of the laws under the Fifth and Fourteenth Amendments of the Constitution of the United States.

## THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Constitution of the United States are as follows:

### FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor

shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## FOURTEENTH AMENDMENT

### Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The provisions of Chapter 4117 of the Ohio Revised Code are set out in the Appendix, *infra*, at pp. 26-28.

## STATEMENT OF THE CASE

### (a) The Nature of the Main Action

The action in which Petitioners sought to intervene is an injunction action brought by a taxpayer against the City of Cincinnati, its City Manager and other officials and titled *Goldberg* v. *City of Cincinnati et al.* The taxpayer's petition alleges, in pertinent part, that on January 5, 1970, employees of the City of Cincinnati engaged in a strike in violation of Chapter 4117 of the Ohio Revised Code; that the officials of the City were coerced and intimidated into entering into an agreement with the representatives of said employees under the terms of which

the City agreed to increase the compensation of said employees and take other action alleged to be improper; and that the execution and performance of such an agreement would be in contravention of the laws of Ohio. The plaintiff requested an injunction restraining the City "from executing and performing the agreement above referred to" and from paying any increased compensation to the employees who struck for at least one year.

### (b) The Motion to Intervene

At the trial in the Court of Common Pleas a timely motion to intervene was made by the Petitioners, District Council 51 and Stanley Harmon, an employee of the City for himself and other employees similarly situated. The motion sought intervention by either of the movants. Although said motion was unopposed, it was denied.

The verified allegations in support of the motion to intervene were not controverted and must therefore be assumed to be factual. They establish the following facts: Since 1960 District Council 51 has been and it is the recognized bargaining representative of some 2,000 non-uniformed employees of the City. In January, 1970 a work stoppage occurred which continued until February 8, 1970. Negotiations ensued between District Council 51 and the City Manager and on February 5, 1970 District Council 51 and the City Manager arrived at and executed a settlement agreement which provided, *inter alia*, for wage increases for the employees affected. On February 11, 1970 City Council of the City of Cincinnati enacted an ordinance providing such wage increases.

The underlying recognition agreement between the City and District Council 51 which has been in effect since 1960, contains the following provisions (Motion for Leave to Intervene, p. 2):

"2. DEFINITIONS.

a. Exclusive bargaining rights agreed to in this agreement shall be interpreted to mean that management will make no change in working conditions, nor recommend any change in wages to City Council, which would affect the bargaining unit without negotiation with the union.

• • •

5. WAGES, FRINGE BENEFITS, AND WORKING CONDITIONS.

The wages, fringe benefits, and working conditions for employees covered by this agreement shall be in accordance with the ordinances from time to time passed by the City Council, which are herewith made a part of this agreement. Prior to the submission of any recommendations for any changes in ordinances affecting wages, fringe benefits, or working conditions, the City Manager will negotiate with the union and attempt to reach agreement on such changes; and if so reached, such agreement will be reported in the Council. If such negotiations fail to result in agreement, the provisions of the Council policy resolution will apply.

6. MANAGEMENT RESPONSIBILITIES.

Nothing in this agreement shall be construed as delegating to others the authority conferred by law on any city official, or to in any way abridge or reduce such authority, but this agreement shall be construed as requiring said city officials to follow the procedures and policies prescribed herein, to the extent they are applicable, in the exercise of the authority conferred upon them by law."

The negotiations with the City Manager which resulted in the settlement agreement of February 5, 1970, were conducted within the framework of said recognition agreement.

The motion to intervene alleged that if the Plaintiff prevailed District Council 51 and the employees whom it represents would be deprived of their valuable property rights and District Council 51 would be deprived of the rights and benefits inuring to it as the recognized collective bargaining agent of said employees.

With respect to the alternative motion to intervene by Petitioner Stanley Harmon, the verified motion alleged that he is one of a class of several hundred City employees whose wages and other benefits would be adversely affected by the relief sought by Plaintiff; that said employees would be deprived of their wage increases and might also lose their status as permanent employees in the Civil Service and that they would suffer such deprivations without fair hearing and due process of law. Finally, the motion alleged that the proposed intervenors intended to present defenses which the City might not present, that their interests could not be adequately represented by the City and that "there cannot be a complete and proper adjudication of their property rights unless they or their representatives are parties to this proceeding."

### (c) Further proceedings in the Courts below

Following the denial of intervention by the Court of Common Pleas the case proceeded to trial on the merits following which judgment was entered dismissing the complaint (Appendix, infra, p. 19). Plaintiff appealed from the judgment of dismissal and Petitioners appealed from the denial of their motion to intervene. In the Court of Appeals Petitioners made another motion to intervene, on the same grounds as those advanced in the Court of Common Pleas and to consolidate their appeal with that of the Plaintiff. Although unopposed, that motion was denied (Appendix, infra, p. 17). Petitioners then pur-

sued their appeal from the denial of their motion to intervene in the Court of Common Pleas, alleging in their Assignments of Error (p. 6), that the invalidation of the contract between District Council 51 and the City without making District Council 51 a party "constituted a deprivation of property rights without due process of law" and that, "If the court were to render judgment as prayed for by the plaintiff – it would be depriving the employees of their valuable rights without a hearing and without due process, in violation of the Civil Service Laws, Art. I, Sec. 16 of the Constitution of Ohio and the Fifth and Fourteenth Amendments of the Constitution of the United States" (p. 8-9). Since the appeal of the City was on both law and fact, resulting in a trial *de novo*, Petitioners requested that their appeal be upheld, that one of them be permitted to intervene as party defendant in the Court of Appeals, file an answer and participate fully in the appeal of the main case. Although not opposed by the parties, the appeal was denied and the Court of Appeals affirmed the judgment of the Court of Common Pleas denying intervention (Appendix, infra, p. 16). Thereafter, it reversed the judgment of the Court of Common Pleas in the main case (Appendix, infra, p. 20). The key finding of the Court of Appeals is contained in the following excerpt from its opinion (Appendix, infra, p. 23):

> "Section 4117.04, Ohio Revised Code, does not apply to the case at bar. That section defines what conduct on the part of a public employee shall be deemed to constitute a strike. It has been stipulated that the employees of the City of Cincinnati were on strike. Consequently, the further proviso of Section 4117.04, Ohio Revised Code, that notice shall be sent to an employee who unlawfully fails to report for duty that he is on strike does not pertain here. *The acts of the employees, established by stipulation binding*

> *upon the parties to this litigation and by the evidence, constituted a strike as defined by Section 4117.01.* Therefore, to hold that the city should have sent notice to employees that they were striking illegally when those employees had already informed the city they were so striking would be to require the city to do a vain act. The deliberate failure of the city to send the notice alluded to in Section 4117.04, Revised Code, does not vitiate the force of the Ferguson Act in the instant case." (Italics not in original).

It enjoined the City from

> "executing or performing the agreement, called Memorandum of Settlement — so as to pay, commencing with the date of this entry, any compensation, direct or indirect, in the form of salary, wages or otherwise, to any or all persons who were employees of said City and participated at any time between January 5, 1970 and February 11, 1970 in a strike, as defined in Section 4117.01 of the Ohio Revised Code, against said City, in excess of that compensation received by such person or persons immediately prior to his or their participation in such strike for at least one year from the date of appointment, re-appointment, employment or re-employment of such person or persons."

The City promptly complied with the judgment of the Court of Appeals by reducing to their pre-strike levels the wages of all employees whom it considered affected by that judgment. It also sought leave to appeal the adverse judgment to the Ohio Supreme Court. Petitioners also sought leave to appeal the judgment of the Court of Appeals affirming the order denying their motion to intervene. One of the grounds urged by Petitioners in their appeal to the Ohio Supreme Court was that "The denial of intervention raises serious questions of due process under the Fifth and Fourteenth Amendments of the Constitution of the United States — with respect to each of the Appellants" (Memorandum in Support of Jurisdiction, pp. 18-

19). Petitioners' appeal was denied by the Ohio Supreme Court for the reason that "no substantial constitutional question exists herein" (Appendix, infra, p. 18). The City's request for leave to appeal was granted and its appeal is now pending before the Ohio Supreme Court and should be ripe for argument in the near future. The present posture of the case, therefore, is that the rights of District Council 51 under its settlement agreement with the City Manager and as the recognized collective bargaining representative, and the rights of the employees to the wage increases granted them and their liability under Section 4117.04 of the Ohio Revised Code are about to be adjudicated by the highest court of the state without either of them having been afforded an opportunity to defend.

## REASONS FOR GRANTING THE WRIT

As has been shown, supra, the essential thrust of the complaint is to enjoin the execution or performance by the City of the settlement agreement entered into between the City Manager and District Council 51, the recognized collective bargaining representative. Moreover, the judgment of the Court of Appeals specifically enjoins the City from executing or performing that agreement so as to pay increased wages to its employees who allegedly participated in a strike in violation of Chapter 4117 of the Ohio Revised Code. The only persons adversely affected by that judgment are the Petitioners, since District Council 51 has been deprived of the fruits of its contract and of its collective bargaining status while the employees it represents have been found to have violated the law and have had their wages reduced. The City, which is the only party defendant, will have its coffers enriched to the extent that its employees suffer financially if the Supreme Court of Ohio affirms the judgment of the Court of Appeals. This

is not to say that the City will not pursue its appeal conscientiously, but only that it is apparent that the interests of the Petitioners cannot be said to be represented, much less adequately represented, by the City. A litigant who stands to profit if an adverse judgment is rendered cannot be said to represent the interests of those who will be disadvantaged by such a judgment.

Thus it is clear that the property rights of the Petitioners have been and are being adjudicated in a proceeding in which their interests are not represented and from which they have been barred.

In *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306, it was stated (p. 313):

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty and property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."

See also *Armstrong* v. *Manzo*, 380 U.S. 545; *Grannis* v. *Ordean*, 234 U.S. 385, 394; *Milliken* v. *Meyer*, 311 U.S. 457; *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U.S. 673, 681-682.

The Constitutional issues were squarely presented below and were specifically rejected by the Supreme Court of Ohio.

In *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, this Court dealt with the propriety of a Board order setting aside a contract between an employer and an independent union which had not been made a party to the Board proceeding. Although that case arose under the National Labor Relations Act, the principles of due process which this Court found applicable are of general application. The Court stated (p. 232):

> "We think the Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside. Russell v. Clark's Executors, 7 Cranch, 69, 96; Minnesota v. Hinde, 12 Wheat. 193, 198; Minnesota v. Northern Securities Co., 184 U.S. 199, 235; Gargot v. de Rubio, 209 U.S. 283, 297; General Investment Co. v. Lake Shore and M.S. Co., 260 U.S. 261, 285."

From the foregoing it would appear clear that District Council 51, as one of the contracting parties and as the recognized collective bargaining representative, has valuable and beneficial interests in the contract which the Court of Appeals has set aside and that it therefore had an absolute right to intervene. Equally clear is the fact that the employees as a class, as the beneficiaries of said contract and the only persons who could suffer financial loss as a direct result of a decision in favor of plaintiff, had a similar right to intervene.

It has been held that Section 1254 (1) of the Judicial Code permits review by certiorari of an order denying intervention. *International Union, United Automobile etc. Workers* v. *Scofield*, 382 U.S. 205; *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad Co.*, 331 U.S. 519. The same principles would appear clearly to be applicable to the review, under Section 1257 (3) of the Judicial Code, of similar orders of state courts. See *Country Club Tower Corp.* v. *Tower Management Corp.*, 275 F. Supp. 470, D.C. Mont. (1967) and cases cited.

In *Brotherhood of Railroad Traimen* v. *Baltimore & Ohio Railroad Co.*, supra, the court stated (at p. 524):

> "When a statute or the practical necessities grant the applicant an absolute right to intervene, the order denying intervention becomes appealable. Then it may fairly be said that the applicant is adversely affect-

ed by the denial, there being no other way in which he can better assert the particular interest which warrants intervention in this instance. And since he cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene, the order denying intervention has the degree of definiteness which supports an appeal therefrom. See Pipe Line Co. v. U.S., 312 U.S. 502, 508."

In *International Union, United Automobile etc. Workers* v. *Scofield*, supra, the Court considered the serious disadvantages suffered by one who is denied intervention, notwithstanding that he may not be bound by the judgment under technical *res judicata* rules. Said the Court (at p. 213):

> "Permitting intervention also insures fairness to the would-be intervenor. If intervention is permitted, the parties to the Board proceedings are able to present their arguments on the issues to a reviewing court which has not crystallized its views. To be sure, if intervention is denied in the initial review proceedings, the charged party would not be bound by the decision under technical *res judicata* rules. Still, the salient facts having been resolved and the legal problems answered in this initial review, subsequent litigation serves little practical value to the potential intervenor. In the second appellate proceeding, the Court of Appeals would almost invariably defer to the initial decision as a matter of *stare decisis*."

The court also pointed out that denial of intervention in the initial review proceedings only results in a delay of the time when the disaffected party may seek review and that the decision of the government not to apply for certiorari would also postpone resolution of the issue. So, in the instant case, it is obvious that once the Supreme Court of Ohio has ruled on the case, the possibility of getting any court in that State, including the Ohio Supreme Court,

to take a different view of the law in a new proceeding instituted by Petitioners, is virtually nil. The technical rules of *res judicata* notwithstanding, the rights of Petitioners will, for all practical purposes, be determined in the pending case. Due process requires that one of the Petitioners be given an opportunity to be heard before such a determination is made.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

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**COURT OF COMMON PLEAS**
**HAMILTON COUNTY, OHIO**

---

**No. A245796**

---

**MITCHELL B. GOLDBERG,**

**Plaintiff,**

**vs.**

**CITY OF CINCINNATI, ET AL.,**

**Defendants.**

---

## ORDER ON MOTION TO INTERVENE

The motion in the alternative of District Council 51, American Federation of State, County and Municipal Employees and Stanley Harmon, an employee of the City of Cincinnati on behalf of himself and other employees of the City of Cincinnati similarly situated to intervene as parties defendant herein is hereby denied. To all of which District Council 51 and Stanley Harmon except.

Filed February 16, 1970

**COURT OF APPEALS**
**FIRST APPELLATE DISTRICT OF OHIO**

---

**No. 11193**

---

**MITCHELL B. GOLDBERG,**
**Plaintiff-Appellee,**

**vs.**

**CITY OF CINCINNATI, ET AL.,**
**Defendants-Appellants.**

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**OPINION**

**May 11, 1970**

---

**Appeal on Questions of Law from Court of Common Pleas**
**Hamilton County, Ohio**

---

Mr. Jerome Goldman, for Plaintiff-Appellee

Messrs. William A. McClain, Philip S. Olinger, Thomas H. Crush, for Defendants-Appellants

Messrs. James C. Paradise and Jerry F. Venn, for Proposed Intervenors-Appellants

---

**PER CURIAM.**

An examination of the record discloses no error prejudicial to the rights of Appellant. The judgment of the Court of Common Pleas, Hamilton County, Ohio is, therefore, affirmed.

SHANNON, P. J., HILDEBRANT AND HESS, JJ., CONCUR.

**COURT OF APPEALS**
**FIRST APPELLATE DISTRICT OF OHIO**

---

**No. 11195**

---

**MITCHELL B. GOLDBERG,**
**Plaintiff-Appellant,**

**vs.**

**CITY OF CINCINNATI, ET AL.,**
**Defendants-Appellees.**

---

**ENTRY**

This cause came on for hearing on the Motion of District Council 51, State, County and Municipal Employees Union, and Stanley Harmon, an employee of the City of Cincinnati, for himself and other employees similarly situated, for an Order of the Court granting the Motion for leave to intervene and to consolidate appeals, was argued by counsel and submitted to the Court.

After due consideration, the Court finds said Motion to intervene and to consolidate appeals not well taken and ought to be overruled.

Wherefore, it is Considered, Ordered and Adjudged that the Motion to Intervene and to Consolidate Appeals be, and the same hereby is, overruled.

To all of which counsel excepts.

Filed May 7, 1970

# THE SUPREME COURT OF THE STATE OF OHIO

---

No. 70-387

---

1970 Term

To wit: October 21, 1970

THE STATE OF OHIO, )
City of Columbus. )

---

MITCHELL B. GOLDBERG,

Appellee,

vs.

CITY OF CINCINNATI, ET AL.,

Defendants,

DISTRICT COUNCIL 51, STATE, COUNTY AND MUNICIPAL EMPLOYEES, ET AL.,

Intervenors-Appellants.

---

## APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

**COURT OF COMMON PLEAS**
**HAMILTON COUNTY, OHIO**

---

**No. A245796**

---

**MITCHELL B. GOLDBERG, A TAXPAYER,**
**Plaintiff,**

**vs.**

**CITY OF CINCINNATI, RICHARD L. KRABACH, CITY MANAGER, JAMES FLICK, DIRECTOR DEPARTMENT OF FINANCE, WILLIAM McCLAIN, CITY SOLICITOR,**
**Defendants.**

---

## JUDGMENT OF DISMISSAL AND FINAL JUDGMENT FOR DEFENDANTS

This cause coming on to be heard upon the pleadings and the evidence and the arguments of counsel and the Court being fully advised in the premises, finds that there was a strike of the city employees, that a strike of the city employees with or without the Ferguson Act was unlawful, that the purpose of the strike was to coerce the city officials to raise their wages and obtain other benefits. The Court further finds that the city did not invoke the Ferguson Act and that the Ferguson Act is not self executing. It is therefore hereby ordered, adjudged and decreed that plaintiff's petition be and the same is hereby dismissed and final judgment rendered in favor of the defendants at the cost of the plaintiff.

To all of which plaintiff excepts.

Plaintiff having advised the Court that he intends to appeal on law and fact to the Court of Appeals of Hamilton County, the appeal bond is hereby fixed at $100.

Filed February 17, 1970

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY

---

No. 11195

---

MITCHELL B. GOLDBERG,
Plaintiff-Appellant,

vs.

CITY OF CINCINNATI, ET AL.,
Defendants-Appellees.

---

OPINION

June 22, 1970

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Appeal on Questions of Law and Fact from the
Court of Common Pleas
Hamilton County, Ohio

---

Mr. Jerome Goldman, for Plaintiff-Appellant

Messrs. William A. McClain, Thomas Crush and Philip Olinger, for Defendants-Appellees

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PER CURIAM.

This is an appeal upon questions of law and fact from a judgment of the Court of Common Pleas of Hamilton County.

Plaintiff, as a resident and taxpayer of the City of Cincinnati, filed a petition in which he alleged that certain employees of that city "failed to report for duty, were wilfully absent from their positions, engaged in a stoppage of work . . . for the purpose of inducing, influencing and coercing a change in the conditions, compensation, rights, conditions and obligations of their employment and of intimidating and coercing and unlawfully influencing others from remaining in, and from assuming specific employment, and thereby engaged in a strike as defined by Section 4117.01 of the Revised Code of Ohio."

It is claimed further that the City of Cincinnati, through its officials, was intimidated and coerced into entering an agreement with representatives of those on strike under the terms of which such persons were re-employed and their compensation increased.

Plaintiff prayed for an order to restrain the city and all of its officers from executing or performing the agreement and from paying any increased compensation, direct or indirect, in violation of Chapter 4117 of the Revised Code of Ohio.

The defendants named were the City of Cincinnati, the City Manager, the Director of Finance, the Treasurer, and the City Solicitor. Collectively, such defendants filed an answer in which each and every allegation of the petition was denied.

The evidence before us, de novo, is the same as that presented by all parties upon the hearing below and upon examination and consideration of that evidence we find that there is virtually no dispute as to the controlling facts.

Firstly, it is clear that certain employees of the City of Cincinnati as members of a labor organization met, voted and determined to go on strike, thereafter notifying the leadership of the union of that decision. Representatives

of the union conveyed to the city the advice that the strike would continue until an agreement satisfactory to the union had been reached.

Secondly, the city knew the employees absenting themselves from work were on strike. Upon the hearing, it was stipulated and, therefore, is stipulated here that the employees did go out on strike January 5, 1970 and remained on strike until after the Memorandum of Settlement (Plaintiff's Exhibit Number 1) was signed on February 5, 1970. Further, the City Manager testified that "some fourteen hundred employees were on strike" and that he understood in his dealings with the employees and their representatives that the reason they were out on strike was to influence and induce the city to change their conditions of employment and compensation, and that they did not return to work until February 11, 1970.

The question squarely presented is: Can a public employee strike?

At common law, it is unlawful for public employees to strike. This precept was recognized and some of the reasons underpinning it pointed out in *City of Cleveland* v. *Division 268*, 57 Ohio Law Abstract 173, at page 176:

> "Under the common law . . . there is no right to strike on behalf of public employees, for many reasons, some of which at least, might be paraphrased in the language of several of the decisions, that it is a means of coercing the delegation of the discretion which a public Board or public Body must exercise in the fulfillment of its duties."

Chapter 4117, Ohio Revised Code, (The Ferguson Act) is an expression of the common law. *City of Cleveland* v. *Division 268*, supra. The Ferguson Act is constitutional both under the Ohio Constitution and the Constitution of the United States. *Abbott* v. *Myers*, 20 Ohio App. 2d 65, syllabus four of which states:

"The Ferguson Act does not violate free speech, violate procedural due process, violate the requirements of definiteness, constitute a bill of attainder, or vest judicial power in an officer or body having no authority to exercise judicial power, contrary to the provisions of either the Constitution of Ohio or the Constitution of the United States."

Section 4117.02, Ohio Revised Code, provides in part:

"No public employee shall strike."

Section 4117.04, Ohio Revised Code, does not apply to the case at bar. That section defines what conduct on the part of a public employee shall be deemed to constitute a strike. It has been stipulated that the employees of the City of Cincinnati were on strike. Consequently, the further proviso of Section 4117.04, Ohio Revised Code, that notice shall be sent to an employee who unlawfully fails to report for duty that he is on strike does not pertain here. The acts of the employees, established by stipulation binding upon the parties to this litigation and by the evidence, constituted a strike as defined by Section 4117.04. Therefore, to hold that the city should have sent notice to employees that they were striking illegally when those employees had already informed the city they were so striking would be to require the city to do a vain act. The deliberate failure of the city to send the notice alluded to in Section 4117.04, Revised Code, does not vitiate the force of the Ferguson Act in the instant case.

It is argued to us that the city cannot have the Ferguson Act imposed upon it when its officials chose not to invoke its provisions. However, Section 4117.02, Ohio Revised Code, further provides:

"No person exercising any authority, supervision, or direction over any public employee shall have the

> power to authorize, approve, or consent to a strike by one or more public employees, and such person shall not authorize, approve, or consent to such strike."

Therefore, applying the restrictions of the last quoted code provision, it is apparent that no one in authority over the public employees here involved could authorize, approve, or consent to the strike. The vacillation of the city officials demonstrated by the testimony cannot be justified in law. Their refusal to follow the controlling statutes when the employees themselves advised the city they were on strike, when the officials knew the employees had struck illegally causing the officials to seek and to obtain injunctive relief from the courts, when the officials understood from the outset the purpose of the strike was to induce, influence or coerce a change in conditions and compensation, amounts to a passive or implied consent to such strike. Upon the facts here, uncontroverted and stipulated as they are, the city had no choice but to obey the directive of the legislature.

When the city stipulates that it knew the employees were striking, it cannot be heard to say that it has a discretion to choose to call the illegal acts of the employees by some other name or refuse to recognize what it has stipulated in relation to the strike.

Section 4117.03, Ohio Revised Code, sets forth the conditions upon which an employee who had gone on strike may be re-appointed or re-employed, one of which is:

> "(A) His compensation shall in no event exceed that received by him immediately prior to the time of such violation."

Again, it has been stipulated that there was an increase in pay of the various employees of the city over what they had been receiving immediately prior to the strike. Such

stipulation is fully supported by the exhibits introduced here. Therefore, to grant and to pay the increments violates the law.

Section 4117.03 (B), Ohio Revised Code, provides:

> "His compensation shall not be increased until after the expiration of one year from such appointment or reappointment, employment or re-employment."

Resultantly, the City of Cincinnati and all of its officers must be and are restrained and enjoined from executing or performing the agreement so as to pay any compensation, direct or indirect, in the form of salary, wages or otherwise to any and all persons who were employees of the city and then participated in a strike against the city in excess of that compensation received by such person immediately prior to such strike for at least one year from the date of appointment, re-appointment, employment or re-employment of such person.

SHANNON, P. J., HILDEBRANT and HESS, JJ., CONCUR.

## OHIO REVISED CODE, CHAPTER 4117

## STRIKES BY PUBLIC EMPLOYEES

**§ 4117.01 Definitions. (GC § 17-7)**

As used in sections 4117.01 to 4117.05, inclusive, of the Revised Code:

(A) "Strike" means the failure to report for duty, the willful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment, for the purpose of inducing, influencing, or coercing a change in the conditions, compensation, rights, privileges, or obligations of employment, or of intimidating, coercing, or unlawfully influencing others from remaining in or from assuming such public employment. Such sections do not limit, impair, or affect the right of any public employee to the expression or communication of a view, grievance, complaint, or opinion on any matter related to the conditions or compensation of public employment or their betterment, so long as such expression or communication is not designed to and does not interfere with the full, faithful, and proper performance of the duties of employment.

(B) "Public employee" means any person holding a position by appointment or employment in the government of this state, or any municipal corporation, county, township, or other political subdivision of this state, or in the public school service, or any authority, commission, or board, or in any other branch of the public service.

**§ 4117.02 Strike by public employees prohibited. (GC §§ 17-8, 17-9)**

No public employee shall strike.

No person exercising any authority, supervision, or

direction over any public employee shall have the power to authorize, approve, or consent to a strike by one or more public employees, and such person shall not authorize, approve, or consent to such strike.

§ 4117.03 Reinstatement.

A person violating sections 4117.01 to 4117.05, inclusive, of the Revised Code, may be appointed or reappointed, employed, or re-employed, as a public employee, but only upon the following conditions:

(A) His compensation shall in no event exceed that received by him immediately prior to the time of such violation;

(B) His compensation shall not be increased until after the expiration of one year from such appointment or reappointment, employment or re-employment;

(C) Such person shall be on probation for a period of two years following such appointment or reappointment, employment or re-employment, during which period he shall serve without tenure and at the pleasure of the appointing officer or body.

§ 4117.04 Strike defined. (GC § 17-12)

Any public employee who, without the approval of his superior, unlawfully fails to report for duty, absents himself from his position, or abstains in whole or in part from full, faithful, and proper performance of his position for the purpose of inducing, influencing, or coercing a change in the conditions, compensation, rights, privileges, or obligations of employment or of intimidating, coercing, or unlawfully influencing others from remaining in or from assuming such public employment is on strike, provided that notice that he is on strike shall be sent to such employee by his superior by mail addressed to his residence

as set forth in his employment record. Such employee, upon request, shall be entitled to establish that he did not violate sections 4117.01 to 4117.05, inclusive, of the Revised Code. Such request must be filed in writing, with the officer or body having power to remove such employee, within ten days after regular compensation of such employee has ceased. In the event of such request such officer or body shall within ten days commence a proceeding for the determination of whether such sections have been violated by such public employee, in accordance with the law and regulations appropriate to a proceeding to remove such public employee. Such proceedings shall be undertaken without unnecessary delay.

**§ 4117.05 Termination of employment.** (GC § 17-10)

Any public employee who violates sections 4117.01 to 4117.05, inclusive, of the Revised Code shall thereby be considered to have abandoned and terminated his appointment or employment and shall no longer hold such position, or be entitled to any of the rights or emoluments thereof, except if appointed or reappointed.

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In The

# SUPREME COURT OF THE UNITED STATES

October Term, 1970

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No. 1254

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DISTRICT COUNCIL 51, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES AND STANLEY HARMON,

Petitioners,

vs.

MITCHELL B. GOLDBERG, THE CITY OF CINCINNATI, RICHARD L. KRABACH, CITY MANAGER, JAMES FLICK, DIRECTOR, DEPARTMENT OF FINANCE, WILLIAM H. BLAES, TREASURER, AND WILLIAM McCLAIN, CITY SOLICITOR,

Respondents.

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## BRIEF OF RESPONDENT MITCHELL B. GOLDBERG IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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## INTRODUCTION

Petitioners show none of the bases for the exercise of certiorari jurisdiction by this Court. All that is claimed is alleged error below. Moreover, this particular case is moot and besides Petitioners have already pending another case in the United States District Court raising the same questions attempted to be raised here.

## COUNTER STATEMENT OF FACTS

In January 1970, employees of the City of Cincinnati went on strike and continued to strike for many weeks to coerce the City into paying wage increases and other benefits in spite of an existing court injunction enjoining such strike. The City, after being brought to its knees (in the words of the union's chief official) by accumulating garbage, lack of street repairs, and lack of ice and snow control, inoperability of its sewarge treatment plant and damage to its water works, and other dangers to public health and safety, finally surrendered to the strikers, agreed to their demands, and passed enabling legislation to pay the increased wages and other benefits.

Respondent Mitchell B. Goldberg as a taxpayer filed suit in the Common Pleas Court of Hamilton County against the City of Cincinnati and its chief officers to enjoin the payment of any increase in wages and benefits to employees of the City which the City was coerced into paying because of the strike. Respondent contended that the strike and resulting pay increases were illegal under the anti-public employees strike act in Ohio, the Ferguson Act, Chapter 4117 of the Ohio Revised Code; that the strike was in contempt of an existing, unreversed, final permanent court injunction enjoining such strike; that such illegal strike and contempt of court was used successfully to coerce the City into agreeing to pay the increase and other benefits in question; that in order to uphold the law and respect for court orders, the striking employees should not be permitted to be rewarded by retaining the benefits and fruits of such violation of law and contempt of court, and that the Ferguson Act expressly forbade any increase to such strikers for at least one year from the end of their strike. Respondent expressly waived allowance of attorney's fees if successful.

The petitioners here, as proposed intervenors, were a council of the unions involved and one of its officers and were both defendants in the earlier injunction suit who had violated the permanent injunction above referred to, and moved to intervene as defendants in the common pleas court below. That court overruled such motion, but permitted them to appear as amici curiae. Also they sat at the counsel table for the defense, and counsel for the City cooperated closely with their counsel. The Common Pleas court although finding:

> ". . . there was a strike of the city employees, that a strike of the city employees with or without the Ferguson Act was unlawful, that the purpose of the strike was to coerce the city officials to raise their wages and obtain other benefits,"

nevertheless further found that the city did not "invoke" the Ferguson Act and dismissed respondent's petition.

Thus, although the common pleas court did not grant petitioners' motion to intervene, it decided the case on its merits in their favor, so that the denial of their motion could not have been prejudcial. Petitioners appealed the common pleas court's denial of their motion to intervene to the Court of Appeals of Hamilton County, which affirmed that order of the court of common pleas. From the Court of Appeals' affirmance, petitioners appealed to the Ohio Supreme Court by motion to certify the case. The Ohio Supreme Court denied the appeal.

When respondent appealed the case on the merits to the state Court of Appeals, where under Ohio law, the Court of Appeals heard the case on a trial de novo, the Petitioners filed a motion to intervene in the trial de novo in that court. That court likewise permitted them to appear as amici curiae, to sit at the counsel table, make oral argument, and instructed the City to incorporate in the

City's brief any arguments which Petitioners wished to make, which the City did. However, the Court of Appeals denied their motion to intervene as formal parties. That order of the Court of Appeals, however, has *not* been appealed to any higher court.

On the trial de novo of respondent taxpayer's suit in the Court of Appeals, the court ruled in respondent's favor and enjoined the City from paying increases to those city employees who were on strike for a period of one year from the strike, but did not determine which employees were on strike. The City appealed that decision to the Ohio Supreme Court which recently heard arguments on the merits. Petitioners once more were permitted to appear as amici curiae and file a brief. They again were permitted to sit at counsel table and were permitted to and did participate in oral argument.

It thus appears that if the writ of certiorari were granted by this Court the only question before this Court would be whether the Court of Appeals was correct in affirming the order of the Common Pleas Court denying the motion to intervene in the latter court which decided the merits of the case favorably to petitioners. The denial by the Court of Appeals of a similar motion to intervene in the trial de novo in that court was never appealed and is *not* before this Court.

## ARGUMENT

**THERE CAN BE NO ERROR PREDICATED ON THE AFFIRMANCE OF A DENIAL OF A MOTION TO INTERVENE IN THE TRIAL COURT WHERE THE TRIAL COURT DECIDES THE CASE ON THE MERITS IN FAVOR OF THE PARTY OR PARTIES WHOSE MOTION TO INTERVENE WAS DENIED. THE FAVORABLE DECISION ON THE MERITS IN SUCH A CASE MAKES THE MOTION TO INTERVENE MOOT.**

Since the Common Pleas Court in this case dismissed respondent's petition and entered final judgment against him on the merits, it thereby gave the proposed intervenors the most favorable possible judgment in their favor on the merits. Having achieved the most favorable end result possible had their motion to intervene been granted, its denial could not have been prejudicial and the entire question of their claimed right to intervene was rendered moot.

The affirmance by the Court of Appeals of the denial of the motion to intervene in the Common Pleas Court is the only question sought to be appealed to this Court. Petitioners have erroneously included in the Appendix to their brief the Entry of the Court of Appeals denying their motion for leave to intervene in that Court. That decision, however, has never been appealed to any court and the time for appeal from that order has long expired.

Since the denial of the motion to intervene in the Common Pleas Court was not prejudicial and had become moot, the affirmance by the Court of Appeals could not have been erroneous, as courts do not rule on moot questions. *State of Ohio* v. *United States*, 292 U.S. 498 (1934); *United States* v. *Alaska S.S. Co.*, 253 U.S. 113 (1920); *Oil Workers Unions* v. *Missouri*, 361 U.S. 363 (1960).

**IN A TAXPAYER'S ACTION TO RESTRAIN ILLEGAL PAYMENT OF CITY FUNDS, IT IS NOT REVERSIBLE ERROR TO DENY INTERVENTION TO PROPOSED RECIPIENTS OF SUCH FUNDS WHERE PROPOSED INTERVENORS CANNOT SHOW THEIR INTERESTS ARE NOT ADEQUATELY REPRESENTED, AND PARTICULARLY WHERE THEY SHOW NO PREJUDICE.**

Rule 24 (A) of the new Ohio Rules of Civil Procedure which is virtually identical with Rule 24 (a) F.R. Civ. P. summarizes the rules for intervention as of right as decided by the cases. That rule provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest *unless the applicant's interest is adequately represented by existing parties.* (emphasis added)

The proceeding on the merits was an adversary proceeding in every respect. The City vigorously opposed the respondent taxpayer's contention and did everything possible to keep him from prevailing. Indeed, the City won in the Common Pleas Court, the affirmance of whose order denying intervention is what is being appealed to this Court in this case. Besides, petitioners were accepted as amici curiae in all state courts, sat at counsel table, closely conferred with counsel for the City, were permitted to make oral arguments, join in briefs, and filed a separate brief in the Ohio Supreme Court. Indeed, the City not only appealed the Court of Appeals' decision on the merits

in favor of respondent, but persuaded the Court of Appeals to make its decision operate prospectively only so that striking employees were permitted to keep the illegal increase paid to them up to the date of the Court of Appeals Entry, which was almost six months after the strike began. Also the City is accumulating and investing at interest in a separate fund the pay increase enjoined by the Court of Appeals so as to have the same, including the interest, available to the strikers should the City be successful in having the Court of Appeals reversed. Hence, it cannot be said that interests of the petitioners were not properly protected. Since the petitioners' interest was and is adequately represented by the City, they could not intervene as a matter of right. See *Blocker* v. *Bd. of Education of Manhasset, New York*, 229 F. Supp. 714, 715 (E.D. N.Y. 1964); *Allegheny Corp.* v. *Kirby*, 344 F. 2d 571 (2 Cir. 1965); *Wilson* v. *Illinois Central R.R. Co.*, 21 F.R.D. 588 (W.D. Ill. 1957).

Where a taxpayer seeks to enjoin alleged illegal expenditures of public funds from a public entity seeking to expend them, if everyone who had an interest in such expenditure could intervene as a matter of right, there would be nothing but hopeless confusion. See *Crosley Steam Gage and Valve Co.* v. *Manning, Maxwell and Moore, Inc.*, 51 F. Supp. 972, 973 (D.C. Mass. 1943).

The cases cited by opposing counsel are not appropos here since there were special reasons in each for allowing intervention which are not present here. In *Brotherhood of Railroad Trainmen* v. *Baltimore and Ohio Railroad Co.*, 331 U.S. 519, the union was given an absolute right to intervene under the federal statute, Section 17 (11) of the Interstate Commerce Act. The Court found that this right was absolute within the meaning of Rule 24 (a) of the F.R. Civ. P. It is not claimed in this case, nor could

it be, that any statute permits intervention as a matter of right. In *International Union, United Automobile Workers* v. *Scofield*, 382 U.S. 205, the Court limited its holding as to the right of intervention solely to review proceedings of the National Labor Relations Board, 382 U.S. at 210.

A case substantially identical with the case at bar, however, was decided by the Supreme Court of Pennsylvania. In *Legman* v. *School District of the City of Scranton*, 432 Pa. 342, 247 A. 2d 566 (Sup. Ct. Pa. 1968), a taxpayer sought to enjoin the school district from paying increased salaries to striking teachers since to do so would violate 43 P.S. 215.1 et seq. of the Pennsylvania Statutes (Pennsylvania's equivalent of the Ferguson Act) which prohibits striking public employees from receiving an increase in wages for three years after the strike. Appellants in the *Legman* case contended that reversible error was committed in the lower courts because the taxpayer failed to join striking teachers as indispensable parties to the action. The tests in equity as to whether certain parties are indispensable are analogous to the tests which establish intervention as a matter of right. The Court stated at 247 A. 2d 569:

> "But the disposition of this controversy will not affect the interest of any individual employee of the school district. It is true that, if the injunction is obtained, the school board will withhold raises from employees who it determines were "on strike". However, such action by the school board will hardly be conclusive of the rights of these teachers since Section 5 of the act provides a procedure by which each affected teacher will be able to challenge the school board's determination. Thus all that will be adjudicated in the present litigation is the propriety of the school board paying raises to all teachers without determining whether any of such employees went "on

> strike". *In such a controversy the individual teachers are clearly not indispensable* (emphasis added)."

Similarly, in the case at bar, the taxpayer challenged the illegal payment of funds by the City of Cincinnati to striking employees. The court did not decide which individual employees were on strike – this determination was left with the City. The individual employees were not parties to the main case and are not individually bound by that decision.

While there is no doubt that petitioners would have been proper although not necessary parties, permission for them to intervene was a matter of discretion with the court. Neither the City nor the respondent taxpayer ever opposed their efforts to intervene. The denial of intervention was simply an exercise of the court's discretion. The court probably wished to avoid the confusion and interference with orderly process which might have resulted if the door was opened to additional parties. If one union and one employee were permitted to intervene what would prevent other unions and other employees ad nauseam from doing likewise? Petitioners were given practically every right of litigants short of being formal parties. There has been no showing of abuse of discretion.

In the case of *Morris Supt.* v. *Insurance Co.*, 6 Ohio St. 2d 185 (1966), the Supreme Court of Ohio reversed the court of appeals for reversing a denial of intervention in the common pleas court to an insurance company stockholder who wished to intervene in a suit against a company in a conservatorship proceeding, even though such intervention was obviously of great financial interest to such stockholder, because no actual prejudice was shown.

The proposed intervenors, not being parties, could not be legally foreclosed by principles of *res judicata*, should they wish to claim some special interest in spite of the de-

cision in the case below. Hence, they could not be legally prejudiced by the decision. Nor were they in fact prejudiced by not being formal parties.

## ADDITIONAL REASONS FOR DENYING THE WRIT

### THE SAME ISSUES RAISED BY PETITIONERS ARE NOW PENDING IN ANOTHER CASE BROUGHT BY THEM IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

There is now pending in the United States District Court for the Southern District of Ohio, at Cincinnati, in Case No. 7651 on the docket of that court the case of *Cooke, et al.* v. *The City of Cincinnati, et al.*, in which the Petitioner Council #51 and some of its officers have raised the same questions as are attempted to be raised by the Petition for Certiorari in this case. That case is being held in abeyance pending the decision of the Supreme Court of Ohio in the main case below. This is a further reason why this Court should not be called on to exercise jurisdiction in this case at this time.

Even if we ignore the question of mootness and the pending of the same issues in another case in the United States District Court, petitioners have really alleged nothing beyond their attempt to show that the courts below committed error on the motion to intervene. This is not enough to justify this Court's granting a writ of certiorari.

Petitioners still may prevail in the case on the merits now under submission before the Supreme Court of Ohio or in the case which they brought in the United States District Court. Indeed, either of those courts may (we hope not) decide in petitioners' favor, making all aspects of this case entirely moot.

## CONCLUSION

It is respectfully submitted that for all the above mentioned reasons Petitioners' application for a writ of certiorari be denied.

Respectfully submitted,

.....

JEROME GOLDMAN
Attorney for Respondent,
Mitchell B. Goldberg